STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Proposed Rules Governing Public Waters Work Permits, Department of Natural Resources, Minnesota Rule Chapter 6115

REPORT OF THE ADMINISTRATIVE LAW JUDGE

A hearing concerning the above rules was held by Administrative Law Judge Steve M. Mihalchick on July 11, 2002 at 1:30 p.m. and 7:00 p.m. in the Wilson Suite, 2nd Floor, St. Cloud Civic Center, 10 – 4th Avenue South, St. Cloud, Minnesota.

That hearing and this Report are part of a rulemaking process that must occur under the Minnesota Administrative Procedure Act[1] before an agency can adopt rules. The legislature has designed that process to ensure that state agencies—here, the Department of Natural Resources—have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the Agency may have made after the proposed rules were initially published do not result in them being substantially different from what the Agency originally proposed. The rulemaking process also includes a hearing to allow the Agency and the Administrative Law Judge reviewing the proposed rules to hear public comment about them.

Matthew B. Seltzer, Assistant Attorney General, NCL Tower, Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101-2127 appeared at the rule hearing on behalf of the Department of Natural Resources. The members of the Department of Natural Resources hearing panel were: John Stine, Water Management Administrator for the Division of Waters, and his assistant, Bruce Gerbig, also with the Division of Waters.

Approximately fourteen persons attended the hearing. Twelve persons signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed amendments to these rules.

After the hearing ended, the Administrative Law Judge kept the administrative record open for another five working days--until July 18, 2002--to allow interested persons and the Department of Natural Resources to submit written comments. During this initial comment period the Administrative Law Judge received four written comments from interested persons and the Department of Natural Resources. Following the initial comment period, Minnesota law[2] requires that the hearing record remain open for another five working days to allow interested parties and the Department of Natural Resources to respond to any written comments. The Department of Natural Resources and other interested persons submitted two written comments, which were filed by the close of business on July 25, 2002. The hearing record closed for all purposes on July 25, 2002.

NOTICE

The Department of Natural Resources must make this Report available for review by anyone who wishes to review it for at least five working days before the DNR takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the Department of Natural Resources makes changes in the rules other than those recommended in this report, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Department of Natural Resources must then submit them to the Revisor of Statutes for a review of their form. After the Revisor of Statutes approves the form of the rules, the rules must be filed with the Secretary of State. On the day that the Department of Natural Resources makes that filing, it must give notice to everyone who requested to be informed of that filing.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Rulemaking Legal Standards

1. Under Minnesota law,[3] one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rules by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.[4] The Department prepared a Statement of Need and Reasonableness (SONAR)[5] in support of its proposed rules. At the hearing, the Department relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by Department staff at the public hearing, and by the Department's written post-hearing submissions.

2. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.[6] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.[7] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.[8] The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[9]

3. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is legally entitled to make choices between possible approaches so long as its choice is rational. Generally, it is not the role of the Administrative Law Judge to determine which policy alternative presents the "best" approach, since this

would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.[10]

4. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether an agency has statutory authority to adopt the rule, whether the rule is unconstitutional or otherwise illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.[11]

Procedural Requirements

1. On June 25, 2001, the Department of Natural Resources published a Request for Comments on planned rules and rule amendments to rules governing public water work permits.[12] The Request for Comments was published at 25 State Register 1973.

2. On June 15, 2001, the Department of Natural Resources mailed copies of the Request for Comments to all persons and associations on the DNR's rulemaking mailing list.[13]

3. On April 16, 2002, the Office of the Revisor of Statutes approved the rules for publication in the State Register.[14]

4. By letter dated April 30, 2002, the Department of Natural Resources requested that the Office of Administrative Hearings schedule a rule hearing and filed the following documents with the Chief Administrative Law Judge:

(a) a copy of the proposed rules certified by the Revisor of Statutes;

(b) a copy of the Dual Notice of Hearing proposed to be issued; and

(c) a draft of the Statement of Need and Reasonableness ("SONAR").[15]

5. On May 6, 2002, the Office of Administrative Hearings approved the Department's Notice Plan for Dual Notice.

6. On May 14, 2002, the Department of Natural Resources mailed the Dual Notice in accordance with its notice plan to the parties on the agency's rulemaking list.[16]

7. On May 14, 2002, the Department of Natural Resources sent a copy of the Statement of Need and Reasonableness to the Legislative Reference Library.[17]

8. On May 14, 2002, the Department of Natural Resources mailed the Dual Notice and Statement of Need and Reasonableness to legislators as required by Minnesota Statutes § 14.116.[18]

9. On May 15, 2002, the Department sent the Dual Notice of Intent electronically (via e-mail) to the persons and associations identified in the Department's additional notice plan.

10. On May 25, 2002, the Dual Notice of Intent to Adopt Rules With or Without a Hearing and Proposed Permanent Rules Relating to Public Waters Work Permits was published in the State Register at 26 SR 1557.[19]

11. The Department received over 25 requests for a hearing.[20]

12. On June 28, 2002, the Department mailed a Notice of Hearing to those who requested a hearing.[21]

13. On July 2, 2002, the Department mailed a Notice of Hearing and a Working Draft of Technical Changes to all petitioners who requested a hearing.[22]

14. On the day of the hearing, the Department placed the following documents into the record:

(a) The Request for Comments signed by the Commissioner on June 12, 2001;[23]

(b) The Certificate of Mailing the Request for Comments to the persons and associations on the Department's rulemaking list, as signed and dated June 15, 2001, and the certificate of agency mailing list;[24]

(c) The Request for Comments, as published in the State Register on June 25, 2001 at 25 SR 1973;[25]

(d) A copy of the DNR's July 11, 2001 press release seeking public comments on rule revisions;[26]

(e) Copies of the signature lists compiled at the three public information meetings convened by the Department and the Board of Water and Soil Resources on August 22, 2001, October 10, 2001, and January 4, 2001;[27]

(f) The proposed rules approved by the Office of the Revisor of Statutes (Revisor's document RD3281) dated April 16, 2002;[28]

(g) The Office of Administrative Hearings' approval of the Department's Notice Plan for Dual Notice, Dated May 6, 2002;[29]

(h) The Dual Notice of Intent to Adopt Rules, signed and dated May 7, 2002;[30]

(i) The Statement of Need and Reasonableness (SONAR) dated May 14, 2002;[31]

(j) A copy of the transmittal letter and certificate, as signed and dated May 14, 2002, showing that the Department sent a copy of the Statement of Need and Reasonableness to the Legislative Reference Library;[32]

(k) Certificate of Mailing the Dual Notice to the parties on the Department's rulemaking list in accordance with the notice plan, as signed and dated May 14, 2002, and the certificate of mailing list, as signed and dated May 14, 2002;[33]

(l) Certificate of Mailing the Dual Notice and the Statement of Need and Reasonableness to legislators as required by Minn. Stat. § 14.116, signed and dated May 14, 2002;[34]

(m) Certificate of Sending the Dual Notice of Intent to Adopt Rules With or Without a Public Hearing electronically to the persons and associations identified in the Department's additional notice plan;[35]

(n) The Dual Notice of Intent to Adopt Rules With or Without a Public Hearing and Proposed Permanent Rules Relating to Public Waters Work Permits, as published in the State Register on May 25, 2002 at 26 SR 1557;[36]

(o) Copy of the May 28, 2002 DNR press release announcing the proposed revisions to rules relating to the Public Waters Work Permit Program;[37]

(p) Written requests for a hearing received in response to the Department's Dual Notice;[38]

(q) Written comments without a request for a hearing submitted in response to the Department's Dual Notice;[39]

(r) Certificate of mailing the Notice of Hearing to those persons who requested a hearing dated June 28, 2002, and the Notice of Hearing dated June 28, 2002;[40]

(s) Certificate of mailing the Notice of Hearing and a Working Draft of Technical Rule Changes to all petitioners who requested a hearing along with a list of the petitioners and their addresses;[41]

(t) Certificate of Mailing a Notice of Hearing and a Working Draft of Technical Rule Changes to the parties on the agency's rulemaking list, along with a copy of the Notice of Hearing, a copy of the Working Draft of Technical Rule Changes and a list of the parties on the rulemaking list and their addresses;[42]

(u) Certificate of Sending a Notice of Hearing and a Working Draft of Technical Rule Changes by email to the persons and associations identified in the Department's additional notice plan, along with a copy of the Working Draft of Technical Rule Changes and a list of the parties on the rulemaking list and their addresses;[43]

(v) Department of Natural Resources Proposed Technical Changes to the Public Waters Work Permit Rule Amendments;[44]

(w) The Department's Opening Statement with Proposed Rule Changes and Statement of Need and Reasonableness Amendments to Support Proposed Changes, dated July 11, 2002;[45]

(x) Minnesota Laws of 2000, Chapter 382;[46]

(y) Minnesota Laws of 2001, Chapter 146;[47]

(z) Department of Natural Resources Public Waters (Chapter 6115) and Board of Water and Soil Resources Wetland Conservation Act (Chapter 8420) current exempt rule booklet;[48]

(aa) Classification of Wetlands and Deepwater Habitats of the United States, Lewis M. Cowardin, et. al, United States Department of the Interior, Fish and Wildlife Service (1979);[49]

(bb) Guidelines for Ordinary High Water Level (OHWL) Determinations, John Scherek and Glen Yakel, Minnesota Department of Natural Resources, Division of Waters (June 1993);[50]

(cc) Certificate of Delivery of Documents to the Minnesota Department of Agriculture dated April 12, 2002, and a copy of the documents;[51]

(dd) The Department's Response to the June 13, 2002 Minnesota Department of Transportation's Comment Letter;[52]

(ee) The Department's Response to the June 19, 2002 MCEA-Audubon Comment Letter;[53] and

(ff) The Department's Response to the June 13, 2002 Dean-Pearson Petition[54]

15. The period for submission of written comments and statements remained open until July 18, 2002 for comments from the public, and to July 25, 2002 for the Department to respond to the comments. The record closed for all purposes on July 25, 2002.

16. The Department has complied with all applicable procedural requirements necessary for the adoption of the proposed rules.

Nature of the Proposed Rules

17. The public waters work permit program is authorized by Minn. Stat. § 103G.245, and grants the Department of Natural Resources (DNR) the authority to regulate alterations to the course, current or cross-section of Minnesota's public waters. The primary purpose of the public waters work permit rules is to balance the right of riparian landowners seeking access and use of these waters with the rights of the public to conserve and use the water resources of the state in the best interest of its people. The regulatory policy for the program is essentially one of allowing reasonable use of public waters while protecting public health, safety and welfare.

18. This rule is being converted from exempt rule to permanent rule as required by Laws of 2000, Chapter 382, Section 20. Without new permanent rules being adopted, the current exempt rules expire on July 30, 2002 and rule language will revert back to the 1983 version of public water permit rules. The proposed permanent rule also includes changes proposed since adoption of the previously adopted exempt rule, and several proposed technical rule changes identified after the proposed permanent rules were published in the State Register on May 20, 2002.

19. The proposed amendments to the DNR Public Waters Work Permit Rules can be divided into two areas of modifications. The first area contains modifications in rule language due to legislative amendments. The second area of modifications includes revisions proposed by the Department under its rulemaking authority found at Minn. Stat. § 103G.315, subd. 15.

20. Within the first area of modifications, the following proposals are being made to make permanent the exempt rules adopted by the Department pursuant to Minnesota Laws of 2000, Chapter 382 that became effective on July 31, 2000 and expired on July 30, 2002. These modifications were published in the State Register on July 31, 2000 at 25 SR 5 at pages 143-152. These modifications include:

1. amendments due to the repeal of Minnesota Statutes, chapter 105, and recodification in Minnesota Statutes, chapter 103G;

2. replacing the use of protected waters terminology with the use of public waters and public water wetlands terminology to distinguish these waters from wetlands subject to provisions of the Wetland Conservation Act

3. clarifying that activities subject to existing DNR aquatic plant management, water aeration system, watercraft, and water appropriation permits that are regulated by the DNR under other statutes and rules do not require separate and additional public water work permits;

4. amendments to reflect Laws of 1997, Chapter 246 granting the Department authority to regulate boathouses;

5. clarifying and adding new definitions that are consistent with the definitions used in the Wetland Conservation Act rules;

6. amendments to reflect Laws of 1996, Chapter 407 granting the Department additional authority to regulate permanent lake level controls;

7. amendments in public waters permit processing, including language to implement the waiver of public waters wetland permit requirements authorized by Laws of 2000, Chapter 382 and Laws of 2001, Chapter 146, and language to incorporate permit sequencing and replacement authorized in section 103G.45, subd. 7.

8. amendments reflecting changes in enforcement authority authorized by Laws of 2000, Chapter 382;

9. amendments in the permit review procedures authorized by Laws of 2000, Chapter 382 to establish new procedures for developing written agreements between the local government unit administering provisions of the Wetland Conservation Act and the commissioner where the local government unit waives the requirement for a wetland replacement plan to the DNR for projects where a public waters work permit is also required; and

10. amendments to implement the commissioner's authority under Minnesota Laws of 2001, Chapter 146 to waive the permitting requirement to local government units administering the Wetland Conservation Act for public transportation projects affecting public water wetland areas.

21. The other broad area of modifications includes proposals initiated by the Department under its rulemaking authority found in Minn. Stat. § 103G.315, subd. 15. These proposed rules include:

1. adding provisions to address the sequencing concepts of project avoidance, minimization and compensation comparable to language found in the Wetland Conservation Act program rules;
2. adding provisions to determine when compensation for a major change in the public water resource is necessary;
3. replacing the term "protected vegetation" with a reference to the commissioner's broader authority to regulate the taking of threatened or endangered species listed pursuant to Minn. Stat. § 84.0895 and Minn. Rules, Chap. 6134;
4. providing procedures that allow plans developed and adopted on a local basis that are approved by the commissioner to form the basis for public water work permit decisions taking place within the area identified in the approved plan;
5. clarifying that docks under eight feet in width that are installed in compliance with city or county zoning ordinances do not require additional DNR permit authorization, and to clarify breakwater and mooring facility development criteria; and
6. adding a new section to address natural resource restoration projects and by adding language to define terms "ice ridge", "local origin" and "native plants".

Statutory Authority

22. The Department's statutory authority to adopt rules for the program is found in Minnesota Statute § 103G.315, subd. 15, which states that the Commissioner shall adopt rules prescribing standards and criteria for issuing and denying water use permits and public waters work permits.

23. The Administrative Law Judge finds that the Department has the statutory authority to adopt the proposed rules.

Regulatory Analysis

24. The Administrative Procedure Act, at Minn. Stat. § 14.131, requires an agency adopting rules to consider the following six factors in its Statement of Need and Reasonableness (SONAR). The first factor requires:

> (1) **A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.**

The DNR notes that the proposed rules may affect landowners owning land abutting public waters or public water wetlands, state agencies, local units of government, and federal agencies required to obtain or willingly applying for a public waters work permit. Individuals or businesses, such as consultants, engineering agencies, local units of government and specific federal agencies may also be affected. Generally, landowners bear the cost of the proposed rule changes, either through direct regulation by the Department or by local unit of

government regulations that are supported by local tax dollars. The DNR, however, sees the public and riparian owners adjacent to public waters benefiting from the public waters work permit program.

(2) The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

The DNR states that the proposed rules will result in costs to the Department associated with developing the rules, conducting public hearings, and conducting an increased number of contested case hearings that might be brought to challenge or appeal future Department public waters work permit decisions. The Department project development costs may also increase to the extent that permit decisions made in the future will require the Department to provide additional mitigation for impacts allowed under permit to public waters and public water wetlands. This may directly affect the construction of public accesses, trails, parks and forest roads. The Department expects that the costs resulting from these changes will be minimal when compared to the total project development costs.

(3) A determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

The Department is authorized by statute to issue general permits to individuals, agencies, or local units of government to address classes of activity having minor environmental impacts within public waters or public water wetlands. The Department is further authorized by statute to delegate to local units of government the permit authority vested with the Commissioner to issue or deny public water work permits for activities taking place in public waters and public water wetlands. To date, no local government unit has requested delegation. The Department believes that the lack of requests may be due to the lack of state funding available to the local government units to assume the program costs.

The Department also continues to work with the U.S. Army Corps of Engineers through the use of a Memorandum of Agreement to reduce the costs to permit applicants having to secure a separate federal Clean Water Act Section 404 permit or Section 10 permit. The Memorandum of Agreement sets forth procedures where the Department and Corps share copies of permit applications and decisions, and the Corps uses these applications and decisions as the basis for its federal authorization for projects authorized by the Department. There are exceptions to this application process, including projects that exceed three acres of impact, involve the use of dam safety rules, or alter more than 500 feet of natural watercourse by channelization, bank stabilization or diversion.

Finally, the proposed rules add a waiver of permit authority to local units of government following Wetland Conservation Act procedures. This process could be a less costly alternative method of permit program delivery. In addition, the local plan process will be better able to address unique water resource conditions

or concerns that exist at the local level that are difficult if not impossible to address with a rule having statewide application.

(4) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

The governing statute authorizes local units of government to request delegation of the permit authority from the Commissioner for public waters and public water wetlands located within their area. The Department notes that to date no local unit of government has directly requested this authority and this is most likely due to the lack of funding available to local governmental units to defray the costs of program assumption. The Department has also worked with agencies and local governmental units to develop general state permits to address projects that have only minor impacts to public waters and public water wetlands.

(5) **The probable costs of complying with the proposed rule**.

The Department does not anticipate permit fees increasing. But the Department notes that there will be indirect costs associated with complying with the proposed rules and that these will vary according to the project type and location. Application of sequencing standards used by the Wetland Conservation Act where the goal is to first avoid impact to public waters or public water wetlands, and then minimize impact if it cannot be avoided, and finally replace unavoidable impacts, should reduce project costs by reducing the size of the project and possibly the permit application cost.

(6) An assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

The Department asserts that the proposed rule reduces the differences between the existing Federal Clean Water Act, Section 404 Permit Program, and the Minnesota Public Waters Work Permit Program by incorporating common sequencing and mitigation language.

25. The Administrative Law Judge finds that the Department has satisfied the requirements of Minn. Stat. § 14.131, which requires it to ascertain the above information to the extent the agency can do so through reasonable effort.

Performance-Based Rules

26. The Administrative Procedure Act[55] also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.[56] The Department explains that in developing the proposed rules, it sought to make the rules more consistent with the state rules adopted by the Board of Water and Soil Resources for use by local governmental units when implementing the Minnesota Wetland Conservation Act. And

it also sought to make the proposed rules more consistent with the federal rules adopted to implement the Clean Water Act, Section 404 Permit Program administered by the U.S. Army Corps of Engineers. In addition, the Department has proposed part 6115.0250, subpart 8, whereby locally developed plans and controls that are approved by the Commissioner may be substituted for the existing statewide rule language.

Effect on Farming Operations

Impact on Farming Operations

27. Minn. Stat. § 14.111 imposes an additional notice requirement when rules are proposed that affect farming operations. In essence, the statute requires that an agency must provide a copy of any such proposed rule change to the Commissioner of Agriculture at least thirty days prior to publishing the proposed rule in the State Register.

28. The proposed rule contains changes that update citations to public drainage laws. In particular, the proposed rule states explicitly that the public drainage authority must sponsor public ditch repairs exempt from the rules. This proposed rule change is consistent with past Department interpretation of this language. The other rule changes proposed by the Department do not impact farming operations on existing fields and pastures.

29. Because the proposed rule may affect farming operations, the Department provided a copy of the proposed rules and a copy of the draft Statement of Need and Reasonableness to the Commissioner of Agriculture more than 30 days prior to the proposed rule's publication in the State Register as required by Minn. Stat. § 14.111.[57]

Additional Notice Plan

30. Minnesota Statutes §§ 14.131 and 14.23 require that the SONAR contain a description of the agency's efforts to provide additional notice to persons who may be affected by the proposed rules. The Department published a Request for Comments in the State Register on June 25, 2001 (25 SR 1973). The notice described the specific areas of the proposed rule, the statutory authority for the proposed changes, and the parties that could be affected by the proposed rule. The Department also provided additional notice by sending the request for comments and additional information to a number of development and environmental organizations, individuals and legislators. The Department also published a statewide news release and posted a forum on its web site to take comments directly related to the proposed rule.

31. The Department also held a series of meetings with stakeholder interest groups involved with the development of public waters legislation in 2000 and 2001. The stakeholder meetings were held on August 22, 2001, October 10, 2001, and January 4, 2002. Thirty-one people attended the first stakeholder meeting with 21 organizations represented. At the second stakeholder meeting, 37 people attended with 23 organizations represented. And at the third stakeholder meeting, 36 people attended with 23 organizations represented. In addition to these stakeholder meetings, the Department participated in a series of public information meetings held in conjunction with the Board of Water and Soil Resources (BWSR) to acquaint local government, soil

and water conservation district, watershed district, and agency staff of the proposed rule changes.

32. On May 1, 2002, the Office of Administrative Hearings received the Department's Additional Notice Plan. In addition to notifying those persons on the Department's rulemaking list, the Department represented that it provided the dual notice to the list of people attending the stakeholder meetings and to the list of people who requested to receive notice. And the Department issued a press release to all organizations on the Department's Information, Education and Licensing Bureau mailing list to reach newspapers and publications. Administrative Law Steve Mihalchick approved the Department's Additional Notice Plan on May 6, 2002.

Analysis of the Proposed Rules

General

33. Several comments were received in writing and through testimony at the public hearing. The commentators in this matter have paid close attention to detail in the rules and have made suggestions that encompass matters of both substance and form. This Report is generally limited to the discussion of the portions of the proposed rules that received significant critical comment or otherwise need to be examined. Accordingly, the Report will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion has been carefully read and considered. Moreover, because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. For these reasons, it is unnecessary to engage in a detailed discussion of each part and subpart of the proposed rules in this Report. The Administrative Law Judge specifically finds that the DNR has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this Report by an affirmative presentation of facts. He also finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

34. Where changes were made to the rules after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed.[58] The standards to determine if the new language is substantially different from that which was originally proposed by the Department are found in Minn. Stat. § 14.05, subd. 2. Unless mentioned specifically, any language proposed by the Board that differs from the rule as published in the State Register is found not to be substantially different.

Subpart by Subpart Discussion

6115.0170 - Definitions

35. **Subpart 20. Marina**. Within this subpart the definition of "marina" is being changed from an inland or offshore structure for the concentrated mooring of five or more watercraft to a mooring facility for seven or more watercraft or seaplanes. The Department maintains that the change in numbers of watercraft and seaplanes from five

to seven is reasonable because it brings the public waters rules language into conformance with the rules previously adopted to administer the shoreland management program. Minnesota Rule part 6120.3300, subpart 2E(1), specifically addresses the use of lots intended for controlled accesses to public waters or recreation areas for use by owners of nonriparian lots within subdivisions. Additionally, this subpart was changed to define marina as a "commercial mooring facility". The Department explains that this change will allow non-commercial structures authorized under state-approved shoreland controls to be installed without requiring a separate public waters work permit.

36. In written comments submitted at the hearing, Daniel Dean of Muskies, Inc.,[59] requested clarification of the changes to the definition of "marina". Specifically, Mr. Dean wondered if under the rule as proposed, a developer could construct a 50 boat floating docking system without having to go through a permit review so long as the developer did not provide commercial ancillary services. If this is the case, Mr. Dean believes the proposed rule is unreasonable and fails to protect natural resources. Mr. Dean requests that any dock system that accommodates more than 5 watercraft or sea planes be subject to environmental impact review and the permitting process. Mr. Dean further requests that any docking system that accommodates more than 5 watercraft or sea planes by denied a permit if it is determined to "negatively impact aquatic vegetation, aquatic habitat or known fishing spawning areas."

37. In written comments received at the hearing, Fred Bliss, Jim Halloran and Gary Botzek, all of Minnesota Lakes Association (MLA),[60] expressed concern about the negative impact additional permitted structures might have on critical aquatic habitats, aquatic vegetation, and fish spawning areas.

38. In response to Mr. Dean's comments,[61] the Department explains that it increased the threshold number of watercraft from 5 to 7 in the definition of "marina" to be consistent with the shoreland zoning rule (Minnesota Rules, Chapter 6120), which is used by cities and counties in the regulation of land use adjacent to public waters. The shoreland rule was adopted in 1989 and allows the use of a conforming residential lot for the mooring of up to 6 watercraft. The proposed change to the definition of "marina" would allow this use without having to require a separate public waters work permit. In addition, the Department does not find that an increase from 5 to 7 watercrafts allowed without a permit will result in significant adverse affects to public waters. This change recognizes the increase of watercrafts on lakes without eliminating all thresholds or constraints for permit review. Finally, in response to Mr. Dean's question whether a person could, under this rule subpart, construct a 50 boat floating docking system without having to get a permit, the DNR explains that a person could do so but it would then be considered a mooring facility. Without local government approval, this mooring facility would require approval and review under part 6115.0211, subp. 4a. And the rules governing structures in public waters would also apply, Minnesota Rules parts 6115.0210, subps. 3 and 4.

39. The Department has demonstrated that this proposed rule is needed and reasonable.

6115.0210 – Structures in Public Waters

40. **Subpart 3. Prohibited placement of structures**. The Department has added language to this subpart to clarify that the prohibition against structures applies equally to structures, temporary structures and floating structures. Language in item B referring to the prohibition of structures where the structure will be detrimental to protected vegetation is deleted and substitute language is proposed in item E. Item E prohibits structures where threatened or endangered species listed in chapter 6134 would be taken without authorization from the Commissioner pursuant to part 6212.1800 to 6212.2300. The Department contends that the change is reasonable because it will enable public waters work permit decisions to be made more objectively using county biological survey and natural heritage inventory data, studies and other information. And finally, new language is being added to Item C to restore the prohibition of structures allowed for the storage of boats. The prohibited structures were formally identified as "boat houses" but are now identified as "boat storage structures" to be consistent with the rule language prior to the adoption of the exempt rules on July 31, 2000.

41. In written comments submitted at the hearing, Mr. Dan Dean of Muskies, Inc.,[62] objects to the phrase in item B "detrimental to significant fish and wildlife habitat" as a ground for the Department to prohibit structures. According to Mr. Dean, by using the word "significant", very few structures will be prohibited on this ground. Mr. Dean requests instead that the Department take out the word "significant" and instead prohibit structures that would be "detrimental to fish and wildlife habitat". In addition, Mr. Dean objects to the last sentence in item B prohibiting construction "in *posted* fish spawning areas." Mr. Dean points out that most spawning areas within Minnesota waters are not posted and so he requests that the Department strike the word "posted". Mr. Dean suggests that the Department instead say: "Construction is prohibited in *known* fish spawning areas." According to Mr. Dean, such a change is vital in order to protect fish spawning and nursery habitat.

42. In response to Mr. Dean's comments, the Department states that it prefers to retain the word "significant" because it allows the Department to prohibit a project if the Department determines that the habitat that would be affected by the proposed project is special or significant. The Department contends that to restrict activities that may detrimentally affect *any* fish or wildlife habitat is unreasonable. According to the Department, such a restriction would result in very limited ability for riparian owners to exercise their rights to access and use public waters for legitimate purposes. As for Mr. Dean's other request that the Department prohibit construction in "known" as opposed to "posted" fish spawning areas, the Department finds this proposal to be too restrictive. According to the Department, Mr. Dean's suggestion would virtually prohibit the Department from issuing any permits in public waters that exhibit vegetation used by one or more species of fish. The Department will continue to assess the habitat in a proposed project area and if significant or posted, the Department will continue to prohibit permitted activity in that area. The Department believes that Mr. Dean's proposal would unreasonably infringe on riparian owners' rights to use and access public waters and is potentially inconsistent with the statutory language.

43. The Department has demonstrated that this proposed rule is needed and reasonable.

6115.0211 – Specific Standards; Structures

44. **Subp. 4. Breakwaters**. Changes made by the DNR are meant to restrict application of this subpart to breakwaters only. Additional language has been proposed to limit breakwaters to those waters where docks are infeasible, and where prevalent wind, wave, or current conditions along the shoreline preclude the use of docks to moor watercraft. In addition, breakwater structures are to be limited to waters where the condition of the site and the number of watercraft to be moored would preclude development and use of on-land facilities. The DNR asserts that the changes are reasonable as the need for permanent breakwater facilities should be examined before allowing installation of such structures. Permanent breakwater construction results in elimination of public water surface and bed area, and reduces the public's ability to use public waters.

45. In written comments submitted at the hearing,[63] Mr. Dean requested that any provision allowing breakwaters include a prohibition against these developments if they would "negatively impact aquatic vegetation, aquatic habitat or any known fish spawning area."

46. In response to Mr. Dean's comments,[64] the Department notes that any permit issued for breakwaters must also satisfy the requirements of the general structures section of the rule (part 6115.0210), which includes a review for aquatic vegetation, wildlife habitat, or placement on posted fish spawning areas. And a permit for breakwaters must also satisfy the requirements of parts 6115.0240 and 6115.0250, which address permit application procedures, sequencing, and the requirement for project mitigation.

47. The Department has demonstrated that this proposed rule is needed and reasonable.

48. **Subp. 4a. Mooring facilities**. This is a new subpart proposed to address the language on marinas formerly found in subpart 4, and to broaden the scope of this subpart to include mooring facilities. As proposed in subpart 4, language is also being included here to restrict the area of all mooring and maneuvering activities of watercraft to an area normally bounded by the property lines of the applicant as extended into the public waters. The Department maintains that this language is reasonable. The Commissioner can only issue permits for activities where the applicant is the riparian landowner or can comply with the provisions of part 6115.0240, subpart 2, while recognizing that the public has a right to navigate on the surface of public waters after obtaining legal access to do so.

49. Additional language has also been proposed to address private and public mooring facilities. Private mooring facilities not serving as a marina can be allowed under the proposed language if they are consistent with or allowed under local land use controls as determined by the local land use control authority. The DNR contends that this language is reasonable as the demand for mooring facility space is governed by the development allowed by the local land use authority. Public mooring facilities not serving as a marina can be allowed under the proposed language if the local unit of government passes a resolution specifying the public interest to be benefited by the

proposal and where the size of the facility is consistent with the demand for mooring in the area and the facility is available for use by the general public. According to the DNR, this language is reasonable because it recognizes that the public has the opportunity through local government zoning processes to interact in the development of public proposals and to ensure that the facility is appropriately sized and open for public use.

50. In written comments submitted at the hearing,[65] Mr. Dean requested that any mooring facility that accommodates 5 or more watercraft or sea planes be subject to environmental review and the permitting process. And Mr. Dean requests that any provision allowing mooring facilities include specific language prohibiting these developments if they would negatively impact aquatic vegetation, aquatic habitat, or any known fish spawning area. Mr. Dean also objects to this provision if it means that a landowner could construct both a dock system and a mooring facility on the same piece of lake shore without going through the permitting process if each system or facility accommodated seven or less watercraft or sea planes. If a landowner can construct both, Mr. Dean objects to allowing such a large concentration of watercraft without any type or environmental review.

51. In response to Mr. Dean's comments,[66] the Department notes that a permit issued for a mooring facility must also satisfy the requirements of the general structures section of the rule, part 6115.0210, which includes a review for aquatic vegetation, wildlife habitat, or placement on posted fish spawning areas. And the permit must also satisfy parts 6115.0240 and 6115.0250 of the rules, which address permit application procedures, sequencing, and the requirement for project mitigation.

52. In written comments received at the hearing, Fred Bliss, Jim Halloran and Gary Botzek, all of Minnesota Lakes Association (MLA),[67] expressed concern about 2nd and 3rd tier shoreland development and the pressure this development and its associated structures exert on public waters.

53. In the Department's written response comments submitted July 25, 2002,[68] the Department responded to MLA's concern by pointing out that part 6115.0250, subpart 8 allows for the development of a local plan that can address this issue. Further, it is a separate rule, Minnesota Rule part 6120, that governs local government regulation of shoreland development and these rules are not proposed for revision at this time.

54. The Department has demonstrated that this proposed rule is needed and reasonable.

55. **Subp. 6b. Energy Exchangers**. This new subpart addresses the construction, reconstruction, relocation, or repair of energy exchangers located on the beds of public waters. The Department is proposing several general and several specific standards governing energy exchangers. The proposed general standards will allow energy exchangers provided that there are no other feasible and practical alternatives for the project that would have less environmental impact, that a closed loop design is used, and that the facility shall adequately employ appropriate engineering design factors. The Department maintains that these standards are

reasonable to minimize general site impacts, to appropriately size the proposed facility, and to protect public health, safety and welfare.

56. The proposed specific standards in this subpart include restrictions on the use of energy exchangers in public waters having additional management or zoning restrictions, and a specific prohibition on their use in a designated trout stream or lake, designated wild and scenic river or in an outstanding resource value water as defined in part 7050.0180. The energy exchanger is also required to be designed and located so as not to cause a navigation hazard, and to minimize the encroachment on or damage to the environment, particularly water ecology. And the location of the exchanger must not take threatened or endangered species identified in chapter 6134 without authorization by the Commissioner pursuant to part 6212.1800 to 6212.2300. Finally, the exchanger must not contain substances that if released into public waters would be detrimental to water quality or plant or animal life.

57. In written comments submitted at the hearing,[69] Mr. Dean requested that the Department make the use of energy exchangers in or on Minnesota waters illegal. According to Mr. Dean, these systems, which contain looped radiator style piping, take energy from a public resource for private gain and take public lake bed out of public use by effectively prohibiting swimming, boating or fishing in the area. In addition, Mr. Dean contends that these systems pose an extreme environmental hazard should the piping become damaged by a boat anchor or something else and leak the heat transfer fluid into the lake or stream. And these systems change the natural geothermal properties of the given area, which will effect the aquatic habitats and aquatic vegetation. Finally, Mr. Dean argues that the demand for these systems might escalate dramatically if energy prices continue to climb and the Department is not prepared to consider the cumulative impact of many such systems.

58. In post-hearing response comments submitted by the Department on July 18, 2002,[70] the Department states:

> "Further evaluation of this rule language and concerns regarding the energy budget relationship of these proposed projects and their potential impacts to the receiving waters has led to a determination by the Department to pursue one or two options in the final rule. The first option is to drop this proposed language (part 6115.0211, subp. 6b) from the proposed rule and conduct additional investigation in conjunction with the Minnesota Pollution Control Agency. The second option is to retain the proposed rule language and insert an additional item in part 6115.0211, subp. 6b, as follows:
>
> I. The construction, relocation, or reconstruction of privately owned structures shall be permitted only when a federal, state, or local government agency accepts responsibility for the future maintenance of the facility or its removal in the event that the private owner fails to maintain or abandons the facility.

59. The Department may either withdraw subpart 6b to conduct additional investigation of this issue and the concerns raised, or it may insert the above underlined

language. Should the Department decide to insert the additional language, the Administrative Law Judge finds that the proposed modification to this rule part would not make the rule substantially different from the proposed rule. The modification is within the scope of the matter announced, supported by the record and addresses concerns raised at the public hearing. The Department has otherwise demonstrated the proposed rule to be needed and reasonable.[71]

6115.0250 – Permit Review

60. **Subp. 1a. Effect on environment and mitigation**. This new subpart follows existing language in Minnesota Statutes § 103G.245, subd. 7(b) requiring compensation for the detrimental aspects of major changes to public waters and public water wetlands allowed under permit. According to the Department, this language is reasonable because the procedures that can be used must be scientifically accepted evaluation methodologies that are accepted by the Commissioner. This language is also similar to that contained in the Wetland Conservation Act (WCA) Rules (part 8420.0549).

61. In written comments received at the hearing,[72] Mr. Dean requested a clarification on whether under this subpart a permit could be granted that would allow destruction of a known spawning area so long as some other action was undertaken to compensate for the destruction. If yes, Mr. Dean objects to this subpart as no amount of compensation can replace known spawning habitat once destroyed.

62. In response to Mr. Dean's comments,[73] the Department points out that it is proposing language from Minn. Stat. § 103G.245, subp. 7(b) that sets forth the conditions when permit compensation is required. According to the statute, "If a major change in the resource is justified, public waters work permits must include provisions to compensate for the detrimental aspects of the change." The program's purpose is to limit, not eliminate the alterations of public waters. To do this, the proposed rule language limits the conditions under which the Commissioner can issue permits and states that if a major change in the resource is justified, the permit must include provisions to compensate for the detrimental aspects of the change. Compensation includes restoring degraded or impacted public waters or creating or restoring additional replacement water areas having equal or greater public value, or any other measures approved by the Commissioner that compensate for the detrimental change.

63. In subsequent post-hearing comments submitted by the Department on July 18, 2002,[74] the Department conceded that it is possible that a permit could be granted that would allow destruction of a known spawning area so long as some other action was taken to compensate for the destruction. The Department points out, however, that existing rule language in part 6115.0210, subp. 3, prohibits construction of structures in posted spawning areas. And this same rule language prohibits placement of structures where the structure would be detrimental to significant fish and wildlife habitat.

64. In written comments submitted by the Department of Transportation (DOT) to the DNR on June 13, 2002, DOT requests that DNR clarify the phrase "major change" used in this subpart and in 6115.0240, subp. 3C(5)(e). DOT recommends that DNR say "major adverse change to public waters" so that it clear that replacement is

required when the major change has been adverse or detrimental. DOT also request that the DNR define what a major adverse or detrimental change might be to give guidance to those involved in the project.

65. In its response to the Department of Transportation's comments,[75] the DNR states that it has proposed a technical change to the published rule that would insert the phrase "major change in public waters" in both instances identified by the DOT. The language in Minn. Stat. § 103G.245, subd. 7(b) uses the words "If a major change in the resource is justified, …." The DNR states that the proposed change makes it clear that the "major change" must take place within the public waters. As for DOT's concern that there is no guidance or definition as to what a "major change" is, the Department states that it intends to use the language provided by Minn. Stat. § 103G.245, subp. 7.

66. The Department has demonstrated that the proposed rule is needed and reasonable. And the technical modification to the language of this proposed rule part does not make the rule substantially different from the proposed rule.

67. **Subp. 5. Public waters wetland permit processing**. Item D of this subpart governs procedures for evaluating public waters work permit applications within public water wetlands. The first item identifies the process by which the Commissioner may waive the requirement for a public waters work permit in public water wetlands to the local unit of government administering the Wetland Conservation Act (WCA). This language is needed to implement the change in the statute that occurred in Laws of 2000, Chapter 382. According to the Department the proposal is reasonable because the Commissioner may waive permit jurisdiction to the local unit of government only after providing 15 days notice to the local unit of government and the permit applicant. The WCA rules require that the local unit of government follow Wetland Conservation Act procedures for activities within the jurisdiction waived by the Commissioner.

68. In Item E of this subpart, the Department proposes two waivers of its permitting authority to public road authorities for repair or replacement of currently serviceable public roads. The first is an automatic but narrow waiver for road projects affecting less than 10,000 square feet of public water wetlands upon receipt of the public road authority's report to the Board of Water and Soil Resources. The second is a broader, but discretionary, waiver for road projects affecting 10,000 square feet or more of public water wetlands. Language is proposed to allow the Commissioner to waive the permit requirement where the Commissioner has received the report submitted to the Board of Water and Soil Resources and where the Commissioner has informed the public road authority of the waiver within 15 days of receipt of the report.

69. In joint written comments submitted by Minnesota Center for Environmental Advocacy (MCEA) and Audubon Minnesota to the Department on June 20, 2002,[76] MCEA and Audubon oppose the Department's proposed waiver of its permit authority to local units of government. MCEA and Audubon see this proposal as a retreat from the DNR's statutory duty to regulate public waters and public water wetlands. MCEA and Audubon would not oppose a "judicious waiver of permit authority" to local units of government if this waiver were carefully circumscribed to protect public waters. Both groups feel the current provision as written does not sufficiently limit the local units of

government. According to MCEA and Audubon, reducing duplication and streamlining the permit process is not enough to justify weakening public water protection. Both groups are concerned that the local units of government lack the resources and expertise to effectively protect Minnesota's waters and wetlands.

70. With respect to subpart 5, the Minnesota Center for Environmental Advocacy (MCEA) and Audubon Minnesota oppose the Department's proposed waiver of its permit authority to local units of government for regulated work in public water wetlands as too broad. These organizations contend that to fully protect public water wetlands, the rules should require the DNR to waive its authority only on a case-by-case basis, and only after consultation with other DNR divisions. And the DNR should require DNR participation on a WCA Technical Evaluation Panel in those cases where it defers to the WCA process. With respect to Item E, MCEA and Audubon do not oppose the more limited waiver to public road authorities. But these groups do object to the broad waiver governing 10,000 square feet or more of public water wetlands. According to MCEA and Audubon, this waiver leaves too much discretion in the hands of self-interested local government units to decide the fate of wetlands that stand in the path of road improvement. These groups also object that this provision was not in the earlier drafts of the rule.

71. As a general response to the concerns expressed by the MCEA and Audubon regarding permit waivers to local governmental units and public road authorities, the Department asserts that there are sufficient safeguards in place in the rules. Specifically, the rules require the DNR to provide written notice to the applicant, the WCA, and the local unit of government or public road authority within 15 days of a permit application. Projects subject to being waived will be evaluated by DNR staff to determine whether the local unit of government's or public road authority's outcome on the project will be comparable to a DNR permit outcome. The DNR also notes in its final written response comments[77] that the proposed waiver of projects impacting over 10,000 square feet of wetlands in public waters was noticed in the State Register publication on May 20, 2002, and does not constitute a major change to the proposed rule. And the Department maintains that the rule is reasonable in that it allows for streamlining of the regulatory process by requiring one approval instead of two. It also allows public road authorities to consolidate project mitigation efforts, resulting in more effective water and wetland replacements.

72. With respect to the MCEA and Audubon's concerns about the broad waiver of permit authority in subpart 5, the DNR states that the rules and procedures in the Wetland Conservation Act will adequately protect the public's interest in public water wetlands. Specifically, DNR participation on WCA Technical Evaluation Panels will be determined according to priorities established within the DNR regions. And provisions within the WCA rules provide that the Technical Evaluation Panel must receive notice of wetland replacement plans. The Technical Evaluation Panel may review such plans if requested to do so by the local government unit or any member of the TEP, and may appeal wetland determinations made by the local governmental unit or the Board of Water and Soil Resources.

73. Finally, with respect to MCEA and Audubon's concerns about item E's broad waiver governing 10,000 square feet or more of public water wetlands, the DNR

again suggests that there are sufficient safeguards in place. The DNR explains that projects subject to being waived to the local road authority will be evaluated by DNR staff for a determination of whether the local road authority's outcome would be comparative to a DNR permit outcome. In addition, the DNR has required that all regions name a WCA Technical Evaluation Panel representative for each WCA local government unit in their region. Provisions within the WCA rules also provide that the Technical Evaluation Panel be given notice of these types of public road project. And those required to receive notice may appeal to BWSR any minimization, delineation, and on-site mitigation decisions made by the public road authority.

74. The Department has presented an adequate rationale for its policy choice and has demonstrated that the proposed rule is needed and reasonable.

75. **Subp. 6. Wetland areas of public waters affected by public road permit projects**. This new subpart implements language in Minnesota Laws of 2001, Chapter 146 that amends section 103G.245, subd. 5(b). It allows the Department to waive to local units of government its authority to permit any public road activities affecting wetland areas of public waters. The waiver is elective to the local government unit if the local government unit makes a replacement, no-loss, or exemption determination in compliance with part 8420, or to the public road authority for repair or replacement of public roads. The Department asserts that this language is reasonable because it provides for a notice provision that will allow the Department to examine the proposed impact. And the waiver of permit authority will allow for streamlining of the permitting process for landowners and other regulated parties. Also the waiver will allow transportation authorities to simplify and streamline wetland replacement efforts by enabling one regulatory process rather than two.

76. In joint written comments submitted by Minnesota Center for Environmental Advocacy (MCEA) and Audubon Minnesota to the Department on June 20, 2002,[78] MCEA and Audubon oppose the Department's waiver in subpart 6 as too broad. These groups contend that the Department's SONAR fails to explain why this waiver is appropriate in public water basins. Minnesota Laws of 2001, Chapter 146 allows for a waiver to local units of government for road projects in wetland portions of public waters, but it does not require it. Absent additional wetland protection assurances, the MCEA and Audubon oppose this waiver provision. According to MCEA and Audubon, the DNR should waive its authority only on a case by case basis and the DNR should require comprehensive road project and public water impact information for large projects before making any waiver decisions under subpart 6.

77. In response to MCEA and Audubon's June 20, 2002 comments, the Department states that it is implementing the legislative intent of Chapter 146 by providing for an elective waiver procedure to the local unit of government within 15 days of receipt of an application. Again, projects subject to being waived in this subpart will be evaluated by DNR staff to determine whether the outcome of the locally authorized proposed project will be comparable to a DNR permit outcome. And the Department requires all regions to name a Technical Evaluation Panel representative for each WCA local governmental unit in their region. WCA rules provide that the TEP is to be given

notice of these projects, and others required to receive notice may appeal minimization, delineation, and mitigation decisions made by the public road authority.

78. In written post-hearing comments from MCEA and Audubon received by the Administrative Law Judge on July 18, 2002,[79] MCEA and Audubon argue that the DNR's response to their earlier comments failed to address their concerns about the ability of local government to enforce the Wetland Conservation Act process. The MCEA and Audubon contend that at a minimum the DNR should make each DNR waiver contingent on the local government unit convening a Technical Evaluation Panel, and require that DNR waivers be issued only after consultation with the Fish, Wildlife and Eco-Services divisions within DNR.

79. The Department is authorized under Minnesota Statutes § 103G.245, subd. 5(b) to waive its permit authority to local units of government. The Department has presented an adequate rationale for the proposed rule and has demonstrated that the proposed rule is needed and reasonable. It is not the role of the Administrative Law Judge to determine which policy alternative presents the "best approach", as this would invade the policy-making discretion of the agency. An agency is legally entitled to make choices between possible approaches so long as the choice made is rational.

80. **Subp. 8. Local plan implementation**. This new subpart permits the Commissioner to approve plans adopted on a local basis that deviate from the standard requirements of the public waters work permit program. The Department contends that the rule is reasonable because it allows the Commissioner to approve local plan agreements only if the local plan contains the procedures and criteria for making decisions on public waters work permits taking place within the area identified in the approved plan. The local plan must address the specific waters that the plan procedures will cover, must be adopted by the local unit of government in either a comprehensive waters or wetlands ordinance or plan, or otherwise approved by the Commissioner, must specify that the plan will not allow activities that are not allowed under applicable local land use controls, must contain provisions to address replacement of unavoidable water resource losses, and must contain provisions addressing enforcement and procedures for the Commissioner to reassume permit authority. According to the Department, such agreements with local units of government could be beneficial in enabling greater flexibility of the regulations based on a more comprehensive, "holistic analysis" of the water resources in a given area.

81. In addition to the above criteria, this subpart includes proposed language requiring the local plan sponsor to publish a notice in the State Register to identify who is developing the plan, how a copy of the local plan can be obtained and provides an opportunity for the public to comment on the proposed plan. The Department maintains that this language is reasonable because it provides an opportunity for the general public to review the proposed plan and comment on factors that may need additional attention before the local plan could be approved by the Commissioner.

82. The last component of this subpart includes language to guide the Commissioner in determining whether to approve the proposed local plan. The Department argues that this language is reasonable because it requires the local plan to justify any changes that deviate from the public waters work permit rules and to explain

how the public value of the public waters that are the subject of the plan will be maintained or improved. In addition, the local plan must explain its mechanism for periodic review of the plan and its procedure for revising the plan.

83. In written comments submitted at the hearing,[80] Mr. Dean expressed concern over allowing local plans to regulate public waters activities. Mr. Dean requested that the Department require its public waters rules be established as a minimum standard for all local plans.

84. In written comments submitted at the hearing by Jim Halloran and Gary Botzek for Minnesota Lakes Association (MLA),[81] the MLA expressed concern about the increased role of local government units in the permit application review process and in the on-going monitoring of already permitted facilities or structures. MLA is not against local permit control but favors strong statewide standards or guidelines for permit review and approval. MLA points out that local units of government will need additional staff and funding in order to review and monitor permits properly. MLA also suggests that local units of government work with established local water organizations to provide input and monitoring.

85. In written comments received by the Administrative Law Judge on July 24, 2002, Marcia Shepard, Associate Editor of *Focus on the Waters*, expressed concern about the increased role of local government in public waters permit application process.[82] Ms. Shepard noted the inherent conflict local governments have balancing their need for the short-term tax revenue that will be generated by development projects, with their responsibility to make reasoned land use or other resource management decisions. Ms. Shepard believes that the ecological integrity of Minnesota waters should not be compromised by the interests of local governments who owe no responsibility to the State's citizenry.

86. In joint written comments submitted by Minnesota Center for Environmental Advocacy (MCEA) and Audubon Minnesota to the Department on June 20, 2002,[83] MCEA and Audubon objected to the DNR's proposal to substitute local plan standards for DNR public waters standards, absent additional safeguards. These groups are concerned that local plans may value and manage public water resources from a local perspective and fail to value and manage the resource from the perspective of downstream communities. MCEA and Audubon suggest that any decision by the Department to approve a local plan obtain the concurrence from all DNR divisions. And MCEA and Audubon recommend that local plans be required to demonstrate that the level of protection it provides is equal or greater than the level of protection provided by the DNR permitting standards.

87. In a response to the comments submitted by MCEA and Audubon on June 20, 2002,[84] the Department states that procedures will be developed so that the Commissioner has the benefit of all departmental division viewpoints before a decision on a local plan is reached. The rule language requires that if the proposed plan is not in conformity with the rules, the plan must provide an explanation as to how the proposed changes to the rules are justified and how the public values subject to the plan are maintained or improved. And in a written response to comments from Mr. Dean, the

Department states that subpart 8 establishes a process by which local plans are developed and reviewed when evaluating the proposed plan for approval.

88. In the Department's post-hearing response comments submitted July 25, 2002, the Department addressed the MLA's concerns regarding the capacity of local governments to manage the permit process. The Department states that local government organizations have been extensively involved in the development and review of the proposed rules and they have participated in the stakeholder meetings. They have not voiced concerns about their role with the Department as set forth in these rule amendments.

89. The Department has demonstrated that the proposed rule is needed and reasonable. An agency is legally entitled to make choices between possible approaches so long as the choice made is rational. It is not the role of the Administrative Law Judge to determine which policy alternative presents the "best approach", as this would invade the policy-making discretion of the agency.

General Comments regarding cumulative impact

90. In written comments received at the public hearing, Jim Halloran and Gary Botzek, both representing Minnesota Lakes Association (MLA), expressed concern over the cumulative effect of permitting certain structures or facilities to be built on public waters. Because public waters work permits are reviewed and approved on an individual or case by case basis, the cumulative impact of all the approved permits is not considered. MLA is particularly concerned about the cumulative effect of permitting larger marinas and mooring facilities, and breakwater structures. MLA recommends that the Department consider the long-term impact and cumulative effect of each permit when considering whether to approve it.

91. In joint written comments from the Minnesota Center for Environmental Advocacy and Audubon Minnesota received by the Department on June 20, 2002, MCEA and Audubon urged the Department to clarify the scope of direct, indirect, and cumulative impacts that should be considered in its public waters permit decisions. In particular, the two organizations recommend that the DNR add rule language clarifying that the agencies should consider downstream impacts, other indirect impacts, and cumulative impacts of a proposed activity. MCEA and Audubon suggest requiring consideration of indirect and cumulative impacts in a watershed context.

92. In its responses to the comments of MLA, MCEA/Audubon, and Dan Dean of Muskies Inc. regarding the lack of rule language addressing cumulative impacts of projects, the Department states that its Division of Ecological Services has been investigating this topic and the topic will be explored further in a participatory process. The DNR will not, however, be able to address the issue of cumulative effects in this current rulemaking process.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Department of Natural Resources gave proper notice in this matter.

2. The Department of Natural Resources has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

3. The Department of Natural Resources has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii).

4. The Department of Natural Resources has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4 and 14.50 (iii).

5. The additions and amendments to the proposed rules suggested by the Department of Natural Resources after publication of the proposed rules in the State Register are not substantially different from the proposed rules as published in the State Register within the meaning of Minnesota Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

6. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

7. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that the rule finally adopted is based upon facts as appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed amended rules be adopted.

Dated: August 26, 2002.

/s/ Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Tape-recorded (2 tapes).

[1] Minn. Stat. §§ 14.131 through 14.20.
[2] Minn. Stat. § 14.15, subd. 1.

[3] Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100.
[4] *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).
[5] Exhibit 9.
[6] *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).
[7] *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).
[8] *Mammenga*, 442 N.W.2d at 789-90; *Broen Mem'l Home v. Minnesota Dept. of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).
[9] *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d at 244.
[10] *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).
[11] Minn. R. 1400.2100.
[12] Exhibit 3.
[13] Exhibit 2.
[14] Exhibit 6.
[15] Exhibit 7.
[16] Exhibit 11.
[17] Exhibit 10.
[18] Exhibit 12.
[19] Exhibit 14.
[20] Exhibit 16.
[21] Exhibit 18.
[22] Exhibit 19.
[23] Exhibit 1.
[24] Exhibit 2.
[25] Exhibit 3.
[26] Exhibit 4.
[27] Exhibit 5.
[28] Exhibit 6.
[29] Exhibit 7.
[30] Exhibit 8.
[31] Exhibit 9.
[32] Exhibit 10.
[33] Exhibit 11.
[34] Exhibit 12.
[35] Exhibit 13.
[36] Exhibit 14.
[37] Exhibit 15.
[38] Exhibit 16.
[39] Exhibit 17.
[40] Exhibit 18.
[41] Exhibit 19.
[42] Exhibit 20.
[43] Exhibit 21.
[44] Exhibit 22.
[45] Exhibit 23.
[46] Exhibit 24.
[47] Exhibit 25.
[48] Exhibit 26.
[49] Exhibit 27.

[50] Exhibit 28.
[51] Exhibit 29.
[52] Exhibit 30.
[53] Exhibit 31.
[54] Exhibit 32.
[55] Minn. Stat. § 14.131.
[56] Minn. Stat. § 14.002.
[57] Exhibit 29.
[58] Minn. Stat § 14.05, subd. 3.
[59] Exhibit 33.
[60] Exhibit 35.
[61] Exhibit 32.
[62] Exhibit 33.
[63] Exhibit 33.
[64] Exhibit 32.
[65] Exhibit 33.
[66] Exhibit 32.
[67] Exhibit 35.
[68] Exhibit 39.
[69] Exhibit 33.
[70] Exhibit 37.
[71] Minn. Stat. § 14.05, subd. 2.
[72] Exhibit 33.
[73] Exhibit 32.
[74] Exhibit 37.
[75] Exhibit 30.
[76] Exhibit 17.
[77] Exhibit 39.
[78] Exhibit 17.
[79] Exhibit 36.
[80] Exhibit 33.
[81] Exhibit 35.
[82] Exhibit 38.
[83] Exhibit 17.
[84] Exhibit 31.